Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	MM Docket No. 97-182

To: The Commission

COMMENTS OF
THE NATIONAL LEAGUE OF CITIES
AND THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS

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SUMMARY

NLC and NATOA urge the Commission to abandon completely the rules proposed in the NPRM. Those rules are, in terms of our system of federalism, a thermonuclear solution in search of what the NPRM concedes is at best an "anecdotal" problem. While local governments certainly support the rapid deployment of DTV, they do not believe that the traditional and vital police powers reflected in local land use, zoning and building permit laws should be sacrificed on the altar of DTV. Nor is there any demonstrated need for such a sacrifice.

The rules proposed in the NPRM represent a preemptive strike by the federal government against the exercise of traditional local police powers that, in breadth and scope, would be unprecedented in the history of our federalism. State and local governments and the laws they enact cannot be treated like the commercial activities of FCC licensees that the FCC can sweep away or micromanage simply because the FCC may not understand or disagree with them.

In fact, the proposed rules are beyond the Commission's constitutional and statutory authority to adopt. By imposing tight, nationwide deadlines within which local governments must exercise their traditional land use, zoning and building code authority, and by conferring on broadcasters a self-executing federal right to disobey such local laws if the local government does not act within the prescribed federal deadline, the proposed rules would essentially displace local land use laws with a new

federal land use scheme made especially for broadcasters. Such comprehensive federal displacement of "the quintessential state activity" of zoning and land use regulation would clearly violate "the Constitution's guarantees of federalism, including the Tenth Amendment." See Printz v. United States, 117 S.Ct. 2365 (1997); New York v. United States, 112 S.Ct. 2408 (1992). In addition, by effectively canceling local public notice and hearing requirements nationwide, the proposed rules would deny citizens their First Amendment right to petition local governments on land use matters.

The proposed rules also represent an improper departure from the Commission's past interpretation of its authority under the Communications Act. It is difficult to believe that DTV rollout, while important, is somehow more essential than the widespread availability of radio and TV services has ever been during the past 63 years since the Act was passed. Yet in those 63 years, the FCC has consistently followed a practice of accommodating, rather than preempting, local land use laws as they relate to broadcast facilities.

Nothing in the interstices of the Communications Act gives the FCC roving authority to dislodge the powers of the states to deal with state law issues merely because FCC licensed facilities are involved. While the FCC has on occasion preempted specific local actions, it has always done so on a case-by-case basis. The FCC has never preemptively wiped out a whole category of local police power and replaced it with a federal regime of

national deadlines and "deemed granted" approvals. Nor can the DTV provision added in 1996, 47 U.S.C. § 336, plausibly be construed to bestow such broad new authority on the Commission.

Even if the Commission had the legal authority to adopt the proposed rules (which it does not), adoption would be wholly arbitrary and capricious because there is no rational nexus between the supposed problem and the broad sweep of the proposed rules. What the NPRM acknowledges is "anecdotal" evidence (specifically, five examples) is hardly any rational basis to wipe out the local land use and building laws of over 30,000 local governments. To the contrary, such scant evidence points unequivocally to the conclusion that local land use laws have not been an obstacle to broadcast facility construction and that there is thus no basis on which to adopt the proposed rules.

In fact, what the record reveals is that the primary obstacle to achieving the FCC's DTV schedule is not state and local law at all. Rather, the primary obstacle is a dire shortage of construction capacity. But the FCC cannot foist onto local governments the onus of truncating their police power responsibilities to try to make up for private marketplace supply problems that the FCC is apparently unwilling or unable to address or accommodate itself.

The proposed rules are also hopelessly overbroad in other respects. There is no basis at all to apply any preemption to local land use regulation of non-DTV broadcast facilities. Likewise, the proposed definition of "broadcast transmission

facilities" extends far beyond the only supposed problem identified in the NPRM -- DTV transmission towers and antennas.

By proposing to truncate fundamental local building code and set-back review processes in the face of what NAB concedes is a "crash program" of massive construction with a scarcity of qualified crews, the proposed rules are a public safety disaster waiting to happen. The combination of tight deadlines and a shortage of qualified labor should call for more, not less, safety monitoring and vigilance. The proposed rules also improperly overlook aesthetic and other legitimate non-safety-related interests served by land use laws, interests that are surely owed even greater deference in the case of mammoth broadcast towers than in the case of small satellite dishes.

Finally, the proposed rules would have perverse and counterproductive effects. They would reward a broadcaster for failing to cooperate with a local government on land use matters. At the same time, the rules would encourage local governments promptly to deny a broadcaster's land use application because that is the only way to avoid the "deemed granted" effect of failing to meet the FCC-imposed deadlines. The increased confrontation and litigation that would ensue would disserve both the FCC's DTV goals and the vital local interests served by land use and building laws.

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TELECOMMUNICATIONS OFFICERS AND ADVISORS

The National League of Cities ("NLC") and the National Association of Telecommunications Officers and Advisors ("NATOA") submit these comments in response to the Notice of Proposed Rulemaking, released August 19, 1997, in the above-captioned proceeding ("NPRM").

NLC is the nation's oldest and largest national organization representing the interests of municipal governments, with a current membership of over 1400 municipalities nationwide. NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer telecommunications policy for the nation's local governments. Because the rules proposed in the NPRM would, if adopted, represent an unprecedented and dangerous federal encroachment upon the authority of NLC and NATOA members to exercise police powers concerning public safety, land use and

zoning that have been traditionally and properly entrusted to them, NLC and NATOA file these comments to register with the Commission their strong opposition to the NPRM.

INTRODUCTION

NLC and NATOA urge the Commission to abandon completely the rules proposed in the NPRM. By placing nationwide time limits -- and very tight time limits -- on local governments' ability to carry out fundamental public safety, land use, building permit and zoning processes and then placing the burden on local governments to justify traditional exercises of police power that they have performed for decades, the proposed rules would not only be an intrusion into local affairs unprecedented in the history of the Commission; they would represent a preemptive strike against the exercise of local police powers by the federal government that, NLC and NATOA submit, would be unprecedented in the history of our federalism.

The NPRM, however, seems strangely unaware of the breadth and scope of the rules it proposes. Indeed, the NPRM is at times almost Kafkaesque. Thus, on the one hand, the NPRM notes (at ¶ 16) that the enormous number of radio and television broadcast stations that exist today "suggest[s] that generally compliance with state and federal laws relating to broadcast station construction and operation has been possible and that state regulation has not been an insuperable obstacle" to achievement of permissible Commission objectives under the Communications Act. The NPRM goes on (at ¶ 19) to characterize (quite properly)

the evidence offered in the NAB Petition as "anecdotal" and providing "no basis on which to determine the extent to which [these anecdotes] are representative of radio and television broadcast industry tower siting experiences generally." The NPRM further purports, again quite properly, to recognize the Commission's "obligation to 'reach a fair accommodation between federal and nonfederal interests'."[1]

Having recognized that past history suggests that compliance with state and local land use and zoning requirements has generally not been a problem for broadcasters, that NAB's evidence is at best "anecdotal," and that the FCC has an obligation to accommodate state and local interests, however, the NPRM then inexplicably proceeds to propose perhaps the most intrusive, blanket form of preemption imaginable: nationwide deadlines within which local governments must act on any local land use, zoning or building code permit or authorization for any type of broadly defined "broadcast transmission facility" or else all local authorizations otherwise required will be "deemed granted." In other words, the NPRM proposes a complete federal displacement of all applicable local laws within a period of 21 to 45 days (depending on the nature of the broadcaster's request). Then, as if to seal that displacement, the NPRM places the burden on local governments to justify traditional state and local police powers that have been recognized and exercised for

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[1] NPRM at ¶ 15 (quoting Arecibo Radio Corp., 101 FCC2d 545, 550 (1985)).

decades, in peaceful coexistence with the permissible goals of the Commission under the Communications Act.

In short, the rules proposed in the NPRM are, in terms of our system of federalism, a thermonuclear solution in search of an at best "anecdotal" problem. NLC and NATOA fervently hope that this huge logical gap in the NPRM is a product of a decision simply to inform commenters of what NAB has proposed and not reflective of any Commission preliminary endorsement or tentative approval of the proposed rules.

The Commission should keep in mind that local governments and the citizens they represent certainly do not oppose -- and indeed support -- the goal of rapid deployment of digital television ("DTV") service, both because of the potential benefits it offers to the viewing public and because rapid deployment will speed the return of analog spectrum that in part will be devoted to public safety use. Local governments do not, however, believe that the traditional and vital police powers reflected in local land use, zoning, and building permit laws should be sacrificed on the altar of DTV. Nor do we believe that there is any need for such a sacrifice.

If the Commission ultimately (and improperly) concludes otherwise, both the Commission and the broadcast industry can expect a long and protracted battle, for as we show below, the rules proposed in the NPRM are beyond the powers of the FCC under the Communications Act, beyond the powers of the federal

government under the Constitution, and, in any event, wholly arbitrary and capricious.

Protracted litigation of the NPRM's proposed rules, of course, would not serve the interests of the Commission, the broadcast industry or local governments, because it would divert attention and resources away from the deployment of DTV and ultimately might well slow that deployment. We therefore urge the Commission and the broadcast industry to work with, rather than against, local governments to ensure that the goal of rapidly deploying DTV is accomplished in a way that properly accommodates, rather than improvidently invades, the historical and legitimate functions of state and local governments in our system of federalism.

I. THE RULES PROPOSED IN THE NPRM REPRESENT AN UNPRECEDENTED FEDERAL INTRUSION INTO STATE AND LOCAL POLICE POWERS AND ARE BEYOND THE COMMISSION'S LEGAL AUTHORITY TO ADOPT.

A. The *NPRM* Proposals Are Unconstitutional.

We begin with what should be obvious fundamental principles that the NPRM completely overlooks. State and local governments and the laws and ordinances they enact cannot be treated as private commercial activities of FCC licensees that the Commission may sweep away or micromanage simply because they do not comport in some way with what the Commission believes best serves its public interest preferences. To the contrary, as the Supreme Court only recently observed:

> The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general

> authority [of the federal government] than the general authority is subject to them, within its sphere.[2]

Moreover, this principle holds true even with respect to federal actions taken pursuant to the Commerce Clause (the only plausible constitutional basis for what the NPRM proposes here):

> The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.[3]

And lest there be any doubt, we hasten to add in this regard that for purposes of "the Constitution's guarantees of federalism, including the Tenth Amendment," municipalities and other local governments, as instrumentalities of the state, are entitled to the same protection as state governments themselves. Printz, 117 S.Ct. at 2382 n. 15.

Moreover, the particular state and local government functions that the NPRM proposes to preemptively displace -- any state or local land use, building or similar law, rule or regulation -- lie at the core of the "sphere" of sovereign functions belonging to state and local governments in our system of federalism. Printz, 117 S.Ct. at 2377. As the Supreme Court has recognized, "regulation of land use is a function traditionally performed by local governments."[4] Indeed, zoning

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[2] Printz v. United States, 117 S.Ct. 2365, 2377 (1997) (quoting J. Madison, The Federalist No. 39, at 245).

[3] New York v. United States, 112 S.Ct. 2408, 2423 (1992) (emphasis added).

[4] Hess v. Port Authority Trans-Hudson Corporation, 115 S.Ct. 394, 402 (1994).

and land use regulation "is perhaps the quintessential state activity."[5]

Viewed against this backdrop, the proposed rules in the NPRM simply cannot withstand scrutiny. By imposing nationwide, federal deadlines within which a local government must carry out the "quintessential state activity" of land use and zoning, and through the device of "deemed granted" treatment, by automatically exempting broadcast licensees from compliance with all local land use, building code and zoning requirements, the proposed rules would essentially displace local land use laws with a new federal land use and zoning scheme made especially for broadcast licensees.

When the national deadlines and "deemed granted" proposals are coupled with the additional proposal to place on local governments the burden of justifying the "quintessential state activity" of land use and zoning, the result is clear: The proposed rules would "effectively requir[e] the States either to legislate pursuant to the [FCC's] directions, or to implement an administrative solution." Printz, 117 S.Ct. at 2380. As the Supreme Court has held, however, "Congress [can] constitutionally require the States to do neither." Id. A fortiorari, the Commission may not do so.

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[5] FERC v. Mississippi, 102 S.Ct. 2126, 2142 n. 30 (1982). See also City of Edmonds v. Oxford House, Inc., 115 S.Ct. 1776, 1786 (1995) (Thomas, Scalia and Kennedy, JJ., dissenting) and cases cited therein.

"The Federal Government may not compel the States to enact or administer a federal regulatory program." Id. (quoting New York v. United States, 112 S.Ct. at 2435). Yet that is precisely what the NPRM's proposed rules would do. The fixed national deadlines and "deemed granted" rules would mean that local land use, building code and zoning laws are displaced and in their place is substituted a new federal land use, building code and zoning law regime -- one that effectively has no public safety, health, aesthetics or traditional land use requirements at all (other than perhaps the rather Orwellian requirement that broadcast facilities would be "deemed" to satisfy all such requirements even if they do not).

Thus even assuming arguendo that there may be some set of facts under which a particular local zoning or land use decision concerning the placement of DTV broadcast transmission facilities might sufficiently impinge on legitimate federal interests to be subject to preemption, the comprehensive scheme proposed in the NPRM -- with its national deadline for local action, "deemed granted" effect, and burden-shifting to local governments -- simply cannot satisfy constitutional muster. The NPRM's scheme represents an unprecedented and grossly overbroad federalization of quintessentially state functions in violation of "the Constitution's guarantees of federalism." Printz, 117 S.Ct. at 2382 n. 15.

The proposed rules also raise additional troubling constitutional problems under the First Amendment clause

protecting citizens' right "to petition the Government for redress of grievances". The rights of citizens, homeowners and neighborhood associations to appear and testify before local planning commissions and city councils on land use and zoning matters is protected by this clause of the First Amendment.[6]

Under state law, local ordinance or charter or both, virtually all local governments are required to give the public notice and opportunity to appear and comment on local zoning or land use decisions. The amount of required notice varies, but is often in the range of one week, two weeks or thirty to sixty days. Moreover, the land use and zoning process often has at least two stages, with required public notice and public hearing before the local planning commission and a separate round of required public notice and public hearing when the planning commission's initial decision is brought before the local city council or county commission for review. Further, planning commissions, city councils, and county boards typically only meet once every two weeks or once a month.

The mandatory 21, 30 or 45-day deadlines proposed in the NPRM, together with the "deemed granted" effect of a local government's failure to act within those proposed national deadlines, would effectively mean that citizens will be denied the public notice and opportunity to be heard before local

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[6] See e.g., Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221, 1226 (9th Cir.), cert. denied, 111 S.Ct. 559 (1990); Colson v. City of Shaker Heights, 880 F. Supp. 1161, 1168-69 (N.D. Ohio 1995); Gibson v. City of Alexandria, 855 F. Supp. 133, 135-36 (E.D. Va. 1994).

planning commissions and city councils to which they are entitled under state and local laws. Local governments would have the choice of either substantially truncating public notice and hearing requirements, in violation of state or local law,[7] or failing to meet the mandatory national deadline and having the broadcaster's request "deemed granted" by force of federal rule, rendering any further public notice a useless exercise. Either way, local citizens would be denied the right effectively to petition the local government on the matter. Such a preemptory federal evisceration of citizens' right to petition their local government would violate the First Amendment.

B. The Sweeping Preemption Proposed in the NPRM Is Beyond the FCC's Authority under the Communications Act.

The comprehensive and sweeping preemption scheme proposed in the NPRM -- strict national deadlines imposed on local governments, coupled with the "deemed granted" effect of a failure to meet those deadlines and shifting the burden to local government to defend the exercise of traditional police powers -- goes far beyond the scope and reach of any preemption power that the Commission has exercised in the entire 63-year history of the Communications Act. Indeed, the far-reaching NPRM proposals represent a startling departure from the Commission's historical

[7] Even if these requirements were truncated, however, it still might be impossible to meet the 21, 30 and 45-day deadlines proposed in the NPRM since local bodies would still often have no time to review a broadcaster's application due to the fact that the decisional bodies typically meet at most only twice per month, and sometimes less.

practice of accommodating "the important state interest reflected in local zoning ordinances."[8]

To be sure, as the NPRM notes, the Commission has on occasion preempted particular local actions on a case-by-case basis. But the Commission has never found within the Communications Act the power to sweep aside, in wholesale fashion, broad general categories of state and local laws (here, land use, zoning laws and public notice laws) and replace them with a uniform federal regime. Yet that is precisely what the NPRM proposes here.

Although the NPRM speaks repeatedly about the importance of rapid deployment of DTV, it is difficult to believe that the rollout of DTV is somehow more important than promoting the widespread availability of radio and television broadcast service has ever been during the past 63 years of the existence of the FCC and the Communications Act. Yet in that 63 years, the Commission has consistently followed a policy of accommodating, rather than preempting, local land use and zoning laws as they relate to the siting and placement of broadcast towers and facilities.[9]

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[8] Izzo v. Borough of River Edge, 843 F.2d 765, 768 (3d Cir. 1988) (citing Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 50 Fed. Reg. 38813 (Sept. 25, 1985) ("Amateur Radio Facilities")).

[9] See, e.g., 47 CFR § 73.3534(b) (allowing extension of broadcast CP's due to, inter alia, "zoning problems"); F.B.C., Inc., 65 RR2d (P&F) 263 (MMB 1988) (same).

The Commission's longstanding policy of accommodating local land use laws in the area of broadcasting is not merely a product of the Commission's beneficence. To the contrary, both the Commission and the Supreme Court have long recognized that the Communications Act does not give the Commission a roving power to sweep aside state and local laws merely because those laws may have some effect on broadcast facilities licensed by the Commission. As the Supreme Court held in Radio Station WOW v. Johnson, 326 U.S. 120, 131-32, 65 S.Ct. 1475, 1482 (1945), there is "nothing in [the Communications Act's] interstices that dislodges the power of the states to deal with [state law issues] merely because [FCC] licensed facilities are involved." Similarly, the Commission has specifically identified "local zoning ordinances" as a category of state and local law that generally has not been viewed as inconsistent with the FCC's Title III broadcast authority. Federal-State Laws in the Area of Broadcasting, 41 RR2d (P&F) 248, 250-51 (1977). Moreover, even where the Commission has considered preemption, it has stressed that whether to preempt a particular state or local action depends on "the specific local law in question" and "must be carefully judged on its own facts." Id. at 250.

Yet the NPRM inexplicably departs from this history of dealing with preemption issues on a case-by-case basis "carefully judg[ed] on its own facts." Instead, the NPRM proposes a blanket federal regulatory regime of a "deemed" granted deadline to displace local law concerning the siting and placement of all

broadcast facilities. In this critical respect, the NPRM is readily distinguishable from -- and indeed inconsistent with -- each of the previous examples of Commission preemption cited in the NPRM. Thus, the Commission's prior preemption decisions relating to amateur radio towers and satellite earth stations did not preemptively wipe out all local land use laws relating to such facilities, set national deadlines for actions, or confer on amateur radio operators or satellite dish owners a federally "deemed" grant of all approvals needed under local law. Rather, those decisions contemplated case-by-case resolution of disputes based on the specific facts and local laws in question.[10]

Further, the scope of the preemption of local land use and zoning laws proposed in the NPRM is far broader than that either proposed or adopted by the Commission even where, unlike here, Congress has given the Commission some degree of explicit statutory authority to preempt. Thus, in the Telecommunications Act of 1996, Congress explicitly gave the Commission a limited degree of preemption authority in the area of personal wireless service facilities, 47 U.S.C. § 332(c)(7)(B)(v), and considerably broader preemption authority with respect to restrictions that impair a viewer's ability to receive television though over-the-

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[10] See, e.g., Amateur Radio Facilities, 50 Fed. Reg. at 38816; Izzo, 843 F.2d at 768; Satellite Earth Stations, 59 RR2d (P&F) 1073, 1082-83 (¶ 34) & 1084 (¶ 40) (1986) (contemplating case-by-case determinations under rule); Preemption of Local Zoning Regulations of Satellite Earth Stations, 11 FCC Rcd 5809, 5813-14 (1996) (noting inappropriateness of per se rule).

air reception devices, 1996 Act, Section 207 (codified at 47 U.S.C. § 303 note).

Even when acting under these specific statutory grants of preemption authority, however, the Commission has not prescribed national deadlines within which local police powers must be exercised, nor has it purported to step into the shoes of local governments and "deem granted" any local authority otherwise required.[11] Rather, in each case, the Commission proposes to address preemption on a case-by-case basis based on the specific facts and local law provisions at issue.[12]

The NPRM, in stark contrast, proposes a far broader form of preemption, even though, unlike the case of wireless facilities and over-the-air reception devices, Congress has not chosen to give the Commission any specific preemption authority over traditional land use laws in the area of broadcast transmission facilities, and even though the Commission has never purported to exercise such authority in the over 63 years since the Communications Act became law. It strains all notions of

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[11] See 47 CFR § 1.400; Procedures under Section 332(c)(7)(B)(v) of the Communications Act, WT Docket No. 97-192, Notice of Proposed Rulemaking (released Aug. 25, 1997) ("Wireless RF Emission Preemption").

[12] See, e.g., Star Lambert, CSR 4913-0, Memorandum Opinion and Order (released July 22, 1997) (applying Section 1.400 of FCC's rules to particular facts at issue and then preempting); Wireless RF Emission Preemption at ¶ 138-139 (proposing to make preemption determinations on a case-by-case basis). The FCC has also proceeded on a case-by-case in applying its preemption rules concerning larger satellite dishes under 47 CFR § 25.104. See, e.g., Willie Brown, DA 97-1361, Report and Order (released July 1, 1997).

statutory construction for the NPRM to suddenly "find" such an incredibly broad, intrusive preemption power after 63 years. Indeed, if the Commission has always had such sweeping preemption authority to displace broad categories of state and local land use laws under the general provisions of the Act cited in the NPRM,[13] the specific provisions that Congress added in 1996 concerning personal wireless services and over-the-air reception devices would have been superfluous.[14] That Congress instead felt it necessary to add such specific authority in the 1996 Act, together with Congress' longstanding acquiescence to the Commission's historically far more limited view of its preemptive authority in such traditional local matters, strongly suggests that Congress never intended to give the Commission such broad authority under Communications Act.[15]

Perhaps sensing this problem, the NPRM (at ¶ 13) also seeks to rely on a new provision, 47 U.S.C. § 336(c), added by the 1996 Act. But the NPRM's reliance is entirely misplaced. While, as the NPRM notes, Section 336(c) requires the FCC to establish as a condition of granting a DTV license that the licensee return

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[13] See NPRM at ¶ 12 n. 16 (citing 47 U.S.C. §§ 152(a), 301, 303(c), (d), (e) and "especially" (f)) & ¶ 13 n. 20 (citing 47 U.S.C. §§ 151 & 157).

[14] See Northwest Forest Resource v. Glickman, 82 F.3d 825, 834 (9th Cir. 1996) (statutes should not be construed to make surplusage of any provision).

[15] See Harris v. Sullivan, 968 F.2d 263, 265 (2d Cir. 1992) (long-time acceptance of reasonable statutory construction, coupled with Congress' failure to reject the same, argues in favor of long-time statutory construction).

either the DTV or the original license to the FCC "for reallocation or reassignment," there is nothing in the text of the provision even remotely suggesting that Congress viewed it as a springboard for the unprecedented and sweeping form of preemption proposed in the NPRM. On the contrary, since Congress in the very same 1996 Act explicitly provided for broad preemption of over-the air reception devices, its failure to do so in the context of broadcast towers strongly suggests that Congress did not intend to give the FCC any broad new preemptive authority in that area.[16]

In sum, the sweeping displacement -- indeed, federalization -- of local police power proposed in the NPRM steps beyond even the broad authority given the Commission under the Communications Act. As the Commission itself has recognized, the Act does not give the Commission a generalized roving power to preempt any activity simply because it might "affect radio reception" or even "jeopardize[] the development of a nationwide system of local television."[17]

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[16] This conclusion is further bolstered by Section 332(c)(7), added in the 1996 Act as well. It would be strange for a Congress that was so obviously concerned about excessive FCC intrusion into local zoning authority with respect to siting of personal wireless service facilities, see 47 U.S.C. § 332(c)(7)(A), to be viewed as somehow tacitly giving the FCC approval to engage in far broader intrusion into local zoning authority with respect to broadcast transmission facilities, which are of course far larger than personal wireless facilities and thus even more directly implicate local land use interests.

[17] Illinois Citizens Committee for Broadcasting, 35 FCC2d 237, 238-39 (1972), aff'd, Illinois Citizens Committee for Broadcasting v. FCC, 467 F.2d 1397 (7th Cir. 1972).

In particular, the Communications Act gives the Commission no authority to displace local governments in wholesale fashion and assume responsibility for local health, safety, land use and aesthetics matters. Yet, by setting national deadlines for local actions on these matters, and then "deeming" all required local approvals "granted" if not acted on within that national deadline, that is precisely what the NPRM's proposed rules would do. The proposed rules accordingly should be abandoned.

II. EVEN IF THE COMMISSION HAD THE LEGAL AUTHORITY TO ADOPT THE PROPOSED RULES (WHICH IT DOES NOT), ADOPTION OF THE RULES WOULD NEVERTHELESS BE ARBITRARY AND CAPRICIOUS BECAUSE THERE IS NO RATIONAL NEXUS BETWEEN THE SUPPOSED PROBLEM AND THE BROAD SWEEP OF THE PROPOSED RULES.

Even if the Commission had sufficient constitutional and statutory power to adopt the sweeping preemption rules proposed in the NPRM (which it does not), it would nevertheless be arbitrary and capricious for the Commission to do so. The proposed rules improperly elevate preemption to a first, rather than last resort. Moreover, the proposed rules are hopelessly overbroad, far exceeding the scope of the supposed problem identified in the NPRM. In fact, in many respects the proposed rules are a completely misdirected effort to solve a problem not created by local land use laws at all, but by a capacity shortage in the private marketplace. Further, the proposed rules are counterproductive in that they would reward broadcaster procrastination in securing land use approvals for broadcast facilities. In addition, the proposed rules improperly elevate DTV above the paramount interests of public health and safety,

and improperly ignore other legitimate and longstanding interests, such as aesthetics and community integrity, that are served by land use laws. Accordingly, the proposed rules should not be adopted.

A. The Proposed Rules Violate the Cardinal Principle That Preemption Must Be Narrowly Tailored And Limited to Specific State or Local Laws That Necessarily Thwart or Impede the Commission's Goals.

In our federal system, preemption of the acts of state or local governments should be the Commission's last, not its first, resort. As the Ninth Circuit has held:

> The FCC may not justify a preemption order merely by showing that some of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC has the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals . . . . '[A] valid FCC preemption order must be limited to [state regulation] that would necessarily thwart or impede' the FCC's goals. . . . 'The FCC has the burden . . . of showing with some specificity that [state regulation] . . . would negate the federal policy . . . .'[18]

The sweeping rules proposed in the NPRM stand these principles on their head. Based on admittedly "anecdotal evidence" of supposed difficulties encountered by broadcasters (NPRM at ¶ 19), the NPRM nevertheless proposes to impose tight nationwide deadlines on all of the more than 30,000 local governments across the nation. The NPRM further proposes to override the laws of each of those more than 30,000 governments

[18] State of California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990) (quoting National Ass'n of Regulatory Utility Commissioners v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1989)) (emphasis in original).